***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

76-4054

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Original B

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RCA GLOBAL COMMUNICATIONS, INC.

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

-and-

ITT WORLD COMMUNICATIONS INC.,
TRT TELECOMMUNICATIONS CORPORATION
and WESTERN UNION INTERNATIONAL,
INC.,

Intervenors.

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PETITION FOR REVIEW OF FEDERAL
COMMUNICATIONS COMMISSION REPORT, ORDER
AND NOTICE OF PROPOSED RULEMAKING

PETITION OF INTERVENOR ITT WORLD COMMUNICATIONS
INC. FOR REHEARING AND SUGGESTION FOR REHEARING
IN BANC

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Docket No.
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PETITION OF INTERVENOR ITT WORLD COMMUNICATIONS INC. FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

## Preliminary Statement

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, Intervenor ITT World Communications Inc., ("ITT Worldcom") hereby petitions this Court for rehearing of

the above-captioned matter. The Court's earlier decision was rendered on July 27, 1977 in an opinion by Judge Moore in which Judge Gurfein joined, with a separate concurring opinion by Judge Feinberg. Rehearing is requested on the grounds that the Court's decision overlooks or misapprehends basic points of law and fact.

In addition, ITT Worldcom respectfully suggests that the case is an appropriate one to be reheard in banc because of the exceptional importance of the issues and because consideration by the full Court is necessary to secure and maintain uniformity of its decisions (Fed. R. App. P. 35).

Statement

The Court's decision vacates two unanimous decisions of the Federal Communications Commission (the "FCC") which were the culmination of 3 years of proceedings held by that agency in response to a complaint which was filed by ITT Worldcom 13 years ago and which challenged the irrationality and inequity of a formula, now 34 years old, for the distribution of outgoing international telegraph traffic. At issue in the FCC's decisions was the allocation among the international telegraph carriers* of approximately $7 million of annual revenues

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* The international carriers include ITT Worldcom, RCA Global Communications, Inc., Western Union International, Inc. and TRT Telecommunications Corporation, all parties to this proceeding, as well as several smaller companies.

arising from the approximately 3,000,000 "unrouted" international telegrams that are delivered to the domestic telegraph carrier, The Western Union Telegraph Company ("Western Union"), without indication by the customer as to which of the several international carriers is to handle the overseas transmission of the telegram.

The original formula for the distribution of this traffic, which was prescribed by the FCC in 1943 pursuant to Congressional mandate, 47 U.S.C. §222(e), tied the allocation of unrouted traffic to the carriers' shares of total international telegraph traffic during the years just prior to the formula's adoption. This formula was struck down by the FCC in its decisions under review because developments in the international telegraph market in the intervening thirty-three years, including the appearance of new carriers and decisive shifts in market shares, made the original formula unjust, unreasonable, inequitable and not in the public interest.

The FCC's factual findings demonstrated that the old formula had utterly failed in practice because it pursued two goals which proved to be incompatible. The formula attempted to honor any choice a customer made between competing carriers but, at the same time, sought to freeze the carriers' total market shares at pre-World War II levels by giving each carrier the amount of unrouted traffic necessary to maintain its market

share at a constant level. However, the international telegraph industry was, and is, characterized by dynamic competition, and each international carrier competed to convince as many customers as possible that they should instruct Western Union that their international telegrams were to be transmitted overseas by that particular carrier. Due to this competition, there was a substantial increase in the percentage of international traffic which was "routed" by the originating customer.* As a result, the pool of "unrouted" traffic became so small that it was impossible to achieve the formula's objective of maintaining the less-successful carriers' market shares, even though in certain geographical areas those carriers received all of the unrouted traffic to compensate them for their failures in the market place. (JA. 11-16).**

The Commission not only found that the old formula failed to work as intended, but also concluded that the formula's original goal of freezing market shares no longer served the public interest. By awarding carriers which were unsuccessful in attracting customer routings an ever-increasing

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* Roughly two-thirds of the 8.6 million outgoing international telegraph messages sent each year are now specifically routed via a designated international carrier by customers who, because of the volume of traffic they originate or for other reasons, are sufficiently concerned and informed to designate the carrier they wish to have handle their messages.

** The page reference, and subsequent references in the same form, are to the Joint Appendix.

proportion of the unrouted traffic (in order to maintain their total market share), the old formula tended to insulate the less-successful carriers from competition and therefore failed to encourage improvements in service or reductions in rates. (JA. 16-17). This "disincentive" to competition was found by the FCC to be inimical to the public interest. (JA. 17).

In place of the original formula, the unanimous FCC prescribed a new formula allocating unrouted traffic on the basis of the carriers' current shares of specifically routed traffic, with provision for semi-annual updating of the carriers' quota to reflect changes in the market place. This new formula, which rewards successful competitors by increasing their allocation of unrouted traffic in proportion to the additional customer routings they attract, was found by the unanimous FCC to be just, reasonable, equitable and in the public interest.

However, although the new formula was clearly intended by the FCC to be a new replacement formula prescribed pursuant to 47 U.S.C. §222(e)(3), it was called by the Commission an "interim formula." In a portion of the FCC decisions which no party asked the Court to review and which is, indeed, nonreviewable because of its lack of finality, the FCC gave Notice of a Proposed Rulemaking to investigate the feasibility

of further revising the international formula. This possible revision of the "interim" formula would eliminate unrouted traffic by requiring the originating customer to "route" each outgoing international telegram by selecting one of the international carriers to carry the message overseas. The FCC conceded that it had not given prior notice of its proposal to consider a system of all-routed traffic, and that it therefore lacked the factual information necessary to decide whether the all-routed system was in the public interest. As a result the FCC determined to hold further proceedings, on notice, to investigate whether such a system was feasible.

The decision of this Court erroneously assumes, despite the clearly stated independent factual basis for the "interim" formula and the clearly stated intention of the FCC not to adopt an all-routed system in the absence of further proceedings, that the "interim" formula would never have been prescribed but for the FCC's proposal to develop by rule making a factual basis for determining whether it should eventually abandon the "interim" formula and move to an all-routed system. In so holding, the Court failed to recognize that the FCC's reasons for prescribing the "interim" formula, as articulated in the FCC's decisions, are not dependent in any respect on the FCC's proposal to study possible further revisions of the international formula.

## Argument

ITT Worldcom seeks rehearing because it believes that the Court's ruling is based on a fundamental misapprehension of the meaning of the FCC's decisions. In addition, ITT Worldcom seeks rehearing because it believes this Court should, at a minimum, not vacate the agency's decision in an administrative proceeding of this magnitude without considering whether a more limited mandate might require the agency to do everything which the Court believes should be done, while at the same time avoiding any further, possibly unnecessary and, in all events, complex revision of the international formula pending decision by the FCC on remand.

1. This Court's opinion misapprehends the meaning of the FCC's decisions. This Court misapprehended the fact that the FCC, itself, never tied the prescription of the "interim" formula to the possible future prescription of a formula requiring all traffic to be routed. On the contrary, the FCC found that the "interim" formula is an appropriate replacement for the clearly unlawful existing formula and is therefore in the public interest -- findings which are not dependent in any respect on the question of whether an all-routed system might eventually be found to be desirable. Thus, the FCC stated in its opinion released September 27, 1976 (JA. at p. 74), with specific reference to the interim formula:

> "We recognize that proportionate distribution is not the only way to distribute unrouted traffic, but it appears to us the most reasonable basis for distributing traffic because it relies on the experience in the market place rather than the arbitrary decision of this Commission. Proportionate distribution, coupled with the interim formula's requirement for frequent updating of the carriers' quotas, allows the distribution to reflect, relatively immediately, changes in the market place and rewards carriers with additional unrouted traffic when they succeed in persuading more customers to route messages via a specific carrier.
>
> "Moreover, we find little merit to RCA's allegations that the Order is deficient because it fails to state how it benefits the public interest to relate a carrier's share of unrouted traffic to its share of routed traffic. To the contrary, we explicitly stated that the purpose of revising the distribution formula was to minimize any disincentives to carrier-initiated improvements in quality of service and to maximize the possibility of future benefits in this regard. 57 FCC 2d at 202. Having found that the original formula provided no incentives for the IRC's to improve service or increase efficiency, our obligations under the mandate of 47 U.S.C. §151 dictated that we adopt a formula which does provide such stimuli. 57 FCC 2d at 208."

Nowhere in this rationale, or in the findings in support thereof, is there any reference to a system of all routed traffic. The fact that the FCC elsewhere in its opinions expressed what RCA Global Communications, Inc. called a "tentative Commission preference for all routed traffic," (Brief at 38) does not negate the solid factual findings upon which the FCC's promulgation of the interim formula was based. To hold otherwise, as this Court does, is to reverse an administrative agency for disagreement with its <u>dicta</u> rather than its holding, and to

reverse by advisory opinion an agency determination which is neither final nor before the Court for review.

What the "interim" formula does is allocate unrouted traffic on the basis of the decisions of those users of international telecommunications who are already sophisticated and informed enough to know the differences among the international carriers, and who are therefore "routing" their telegrams by a particular carrier. By distributing unrouted traffic in the same proportion as routed traffic, the interim formula gives added force to the intelligent choices already being made by those customers who presently route their traffic, thereby stimulating service improvements and rate reductions.* The "interim" formula does not require any

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* The FCC has, thus, not only found, in the passage quoted above, that the interim formula will increase competition, but has also determined that competition will have a beneficial effect by improving service and efficiency, an effect which all parties have recognized and which the FCC in its role as administering agency is best qualified to predict. Surely these findings meet the requirements stated by Justice Frankfurter in F.C.C v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953):

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by

[Footnote continued on next page]

customer to choose among the carriers or to acquire the information necessary to make that choice. However, the allocation of the telegrams sent by these unconcerned and unsophisticated customers is made rational, and competition of benefit to the public is encouraged, by distributing unrouted traffic in conformity with the decisions of those customers who are concerned and knowledgeable enough to determine which of the competing carriers offers better service or lower rates.

2. Alternatively, this Court should grant rehearing for the purpose of limiting the terms of its remand. Even if the FCC's independent factual basis for the promulgation of the "interim" formula were less clear than it is, this Court should, in accordance with existing case law, limit the terms

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[Footnote continued from previous page]

> more flexible procedure.' Far East Conf. v. United States, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. Labor Board v. Seven-Up Co., 344 U.S. 344, 348, but.... it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect."

Here the "ground for reasonable expectation" is the entire history of competition in the international telegraph market of which no one is a better judge than the FCC. And see, General Telephone Co. of Southwest v. United States, 449 F.2d 846, 858 (5th Cir. 1971); Washington Utilities and Transp. Comm'n. v. F.C.C., 513 F.2d 1142, 1157-1160 (9th Cir. 1975), cert. den., 423 U.S. 836 (1975).

of its remand so as to avoid unnecessary and confusing additional proceedings before the agency. The thrust of this Court's opinion is that the FCC has given the Court an insufficient basis from which to determine whether the FCC's decision to prescribe the "interim" formula would have been reached had it not been for the FCC's tentatively stated preference for an all-routed system. To resolve that uncertainty, it is not necessary to invalidate the entire result of the FCC's efforts. All that is required is to remand this case to the FCC for the limited purpose of determining whether the promulgation of the "interim" formula has, in in the opinion of the FCC, a factual basis in the record independent of the FCC's tentative preference for an all-routed system. If the FCC determines upon remand, and upon the record now before it, that it should prescribe the "interim" formula irrespective of its tentative preference for an all-routed system, then the missing factual basis will be supplied to the Court. If, on the other hand, the FCC determines that its original decision was, in fact, influenced in whole or in part by its tentative preference for an all-routed system, then and only then would the further agency proceedings contemplated by the Court's present decision be necessary.

What must be considered in connection with ITT Worldcom's request for a limited remand is not only the extraordinary investment of time and expense, both administrative

and private, which has already gone into this proceeding and the inordinate delay which has already passed without bringing the Commission proceeding to completion, but also the great uncertainty created by the Court's decision with regard to the status of the "interim" formula while the FCC is complying with the Court's decision. This Court has authority both under the case law, Nader v. F.C.C., 520 F.2d 182 (D.C. Cir. 1975); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Booth American Company v. F.C.C., Docket No. 23,862 (D.C. Cir. Feb. 17, 1970) and the Administrative Procedure Act* to retain jurisdiction over this case and remand it to the FCC for the limited purpose of permitting the FCC to decide (within a fixed time period, which ITT Worldcom would suggest be not in excess of 30 days) whether there is an adequate factual basis for the "interim" formula which is independent of the all-routed concept. Alternatively, this Court can provide that the "interim" formula may be continued in effect during the pendency of the FCC's further

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* See, in particular, 5 U.S.C. §706, authorizing the Court to "compel agency action unlawfully withheld or unreasonably delayed" and 5 U.S.C. §705 authorizing the Court to "issue all necessary and appropriate process...to preserve status or rights pending conclusion of the review proceedings." And, see, American Broadcasting Co. v. F.C.C., 191 F.2d 492, 502 (D.C. Cir.1951)

proceedings. Kodiak Airways, Inc. v. C.A.B., 447 F.2d 341 (D.C. Cir. 1971); Braniff Airways, Inc. v. C.A.B., 306 F.2d 739 (D.C. Cir. 1962); Television Corporation of Michigan, Inc. v. F.C.C., 294 F.2d 730 (D.C. Cir. 1961); Sangamon Valley Television Corp. v. United States, 269 F. 2d 221 (D.C. Cir. 1959); Greensboro-High Point Airport Authority v C.A.B., 231 F.2d 517 (D.C. Cir. 1956); American Broadcasting Co. v. F.C.C., 191 F.2d 492 (D.C. Cir. 1951).

3. Suggestion for rehearing in banc. ITT Worldcom also suggests that this proceeding be reheard by the Court in banc. The basis for this suggestion is the exceptional importance of this decision, both in terms of its economic impact on the private parties and in terms of the waste of administrative resources that would be involved in beginning again a proceeding long underway in which a decision is now long overdue. In this connection, it should be pointed out that another panel of this Court, consisting of Judges Oakes, Timbers and Van Graafeiland, had the benefit of extensive briefs and arguments on the merits before denying a motion for a stay of the FCC's order, and may well have reached a decision on the merits in conflict with that of the panel which granted the petition for review.

## Conclusion

For the reasons set forth herein, it is respectfully requested that the petition for rehearing be granted and that,

upon rehearing, the FCC's decision be affirmed, or, alternatively, that a limited remand be made for the purpose of determining, within a fixed time, whether the FCC's factual basis for its decision regarding the so-called "interim" formula was independent of its tentative preference for a system of all-routed traffic. As an another alternative, it is suggested that this proceeding be heard in banc and that upon such rehearing, the FCC's decision be affirmed.

Dated: New York, New York
August 10, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am an attorney associated with the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for Intervenor, ITT World Communications, Inc. I hereby certify that I have served the attached Petition for Rehearing of Intervenor ITT World Communications Inc. on all parties, by mailing true copies thereof by first class mail, postage prepaid, to the following persons at the listed addresses:

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